(2)

No. 93-1505

Supreme Court, U.S.
FILED
APR 21 1994
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TRI-STATE RUBBISH, INC.,
Petitioner,
v.
CITY OF AUBURN, MAINE and
MID-MAINE WASTE ACTION CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of the State of Maine

---

RESPONDENTS' BRIEF IN OPPOSITION

NICHOLAS S. NADZO
Counsel of Record
JAMES N. KATSIAFICAS
EMILY A. BLOCH
JENSEN BAIRD GARDNER & HENRY
10 Free Street, P.O. Box 4510
Portland, Maine 04112
(207) 775-7271
Counsel for Respondent Mid-Maine Waste Action Corporation

G. CURTIS WEBBER
LINNELL, CHOATE & WEBBER
83 Pleasant Street, P.O. Box 190
Auburn, Maine 04212-0190
(207) 784-4563
Counsel for City of Auburn

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

17 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE PRESENTED BY THE PETITION	1
JURISDICTION	1
STATEMENT OF THE CASE	2
A. Background and Proceedings Below	2
REASONS FOR DENYING THE PETITION	3
I. THE PETITION FOR A WRIT OF CERTIORARI DOES NOT MEET THE REQUIREMENTS FOR JURISDICTION	4
II. THE PETITION CONTAINS NUMEROUS RELEVANT LEGAL AND FACTUAL ERRORS	6
CONCLUSION	9
APPENDIX	1a

TABLE OF AUTHORITIES

CASES — Page

Department of Environmental Protection v. Emerson, 563 A.2d 762 (Me. 1989) 4
Ford New Holland v. Thompson Machine, Inc., 617 A.2d 540 (Me. 1992) 5
Town of Gray and Regional Waste Systems, Inc. v. Tri-State Rubbish, Inc. and Recyclables Unlimited Services, Inc., U.S.S.C. Docket No. 93-1133.. 7
Tri-State Rubbish, Inc. v. Town of Gray, 632 A.2d 134 (Me. 1993) 2, 7, 8

STATUTES

Federal Statute
28 U.S.C.A. § 1257 (West 1993) 1, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1505

TRI-STATE RUBBISH, INC.,
Petitioner,

v.

CITY OF AUBURN, MAINE and
MID-MAINE WASTE ACTION CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of the State of Maine

---

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE ISSUE PRESENTED BY THE PETITION

Where Petitioner's appeal of the State trial court's issuance of a preliminary injunction is pending in the State Supreme Judicial Court, and Petitioner's Motion for Stay of the Injunction Pending Appeal is denied by the State Supreme Judicial Court, is the denial of the Motion for Stay reviewable by the United States Supreme Court?

JURISDICTION

There is no jurisdiction for the United States Supreme Court to address this case under 28 U.S.C.A. § 1257 (West 1993). The trial court's (the "Superior Court") decision to grant a preliminary injunction in this matter currently is on appeal to the Maine Supreme Judicial

Court (the "Law Court"), which as yet has neither received briefs nor argument in this matter. Thus, the Law Court has not rendered a final, appealable decision on the validity of the Superior Court's issuance of a preliminary injunction. The Superior Court, moreover, still has jurisdiction over the merits of the case upon a remand from the Law Court from which Petitioner took no appeal.

STATEMENT OF THE CASE

This case as currently postured does not present any substantive issues for this Court to resolve. In addition, the only procedural issue is whether the Law Court correctly denied Petitioner's Motion for Stay of Injunction Pending Appeal ("Motion for Stay") to the Law Court of the preliminary injunction granted to Respondents by the Superior Court. Since review of this issue could not reach the merits of this case, and no final judgment has been rendered, the Petition for Writ of Certiorari should be denied.

A. Background and Proceedings Below

On August 5, 1993, the Law Court upheld the Superior Court's granting of summary judgment to Respondents on all issues Petitioner raised below except Petitioner's Commerce Clause issue with respect to recyclable materials only. *Tri-State Rubbish, Inc. v. Town of Gray and Regional Waste Systems, Inc.*, 632 A.2d 134 (Me. 1993) (Pet. App. 10a-25a). The case was remanded back to the Superior Court for further proceedings consistent with the Law Court opinion. Petitioner did not file a Petition for a Writ of Certiorari based upon the Law Court's decision.

Respondents subsequently sought a preliminary injunction to require Petitioner to comply with the City of Auburn Solid Waste Flow Control Ordinance ("Ordinance"). On February 8, 1994, after oral argument, the Superior Court entered an order granting Respondents'

Motion for Preliminary Injunction. (Pet. App. 2a-9a). Petitioner appealed the Superior Court's Preliminary Injunction and Order to the Law Court, and that appeal is currently pending. (Resp. App. 1a).

Petitioner then filed with the Law Court the Motion for Stay (of the preliminary injunction entered by the Superior Court). The Law Court denied Petitioner's Motion for Stay on February 15, 1994. (Pet. App. 1a). The Superior Court, in issuing the Preliminary Injunction and Order, has not entered a final decision in this case and the Law Court did not address the merits of this case at all in its denial of Petitioner's Motion for Stay.

REASONS FOR DENYING THE PETITION

The central reason for denying the Petition is that there has been no final judgment issued by the Law Court, Maine's highest court. This issue is discussed more thoroughly below. In addition, the Petition contains a number of factual and legal misstatements, some of which bear on this procedural flaw in the Petition, and some of which bear on the merits of this case, should the Petition be granted. Although there are a myriad of errors, only the most salient are discussed below.

1. Petitioner has not identified any appropriate issue for review by the United States Supreme Court and indeed there is none in this case. The only decision rendered by the State's highest court is the Law Court's denial of Petitioner's Motion for Stay, which is not a final decision. This Court is therefore deprived of jurisdiction in this matter.

2. The most relevant legal and factual errors in the Petition are discussed below.

I. THE PETITION FOR A WRIT OF CERTIORARI DOES NOT MEET THE REQUIREMENTS FOR JURISDICTION.

28 U.S.C.A. § 1257 states that only final judgments or decrees by a state's highest court may be reviewed by the United States Supreme Court. As described above, there is no final judgment in this case; currently pending before the State's highest court is Petitioner's appeal of the Preliminary Injunction and Order entered by the Superior Court. The only decision rendered in this case by the State's highest court, within ninety days prior to the Petition for Writ of Certiorari, is the Law Court's denial of Petitioner's Motion for Stay of the preliminary injunction.

The current status of this case presents the issue of whether the Superior Court's Preliminary Injunction and Order is a final judgment for purposes of review by the Law Court, and does not present an issue for this Court at this time. Whether Petitioner's appeal to the Law Court of the Superior Court's Preliminary Injunction and Order is proper as an exception to the final judgment rule will be an issue for the Law Court to decide under the criteria set out in *Department of Environmental Protection v. Emerson*, 563 A.2d 762, 765-766 (Me. 1989) (which by no means stands for the proposition, as suggested by Petitioner, that all preliminary injunctions are final judgments). The appropriate forum for Petitioner's appeal of the Preliminary Injunction and Order is the Law Court where it currently is lodged and is subject to a briefing schedule. (Resp. App. 2a).

With regard to the denial of Petitioner's Motion for Stay, contrary to Petitioner's argument, *Department of Environmental Protection v. Emerson*, 563 A.2d 762 (Me. 1989) does not contain any law on this subject. Because Petitioner's appeal of the Preliminary Injunction and Order is pending before the Law Court, and because regardless of the outcome of that appeal, the case will be

tried on the merits before the Superior Court, there is no final judgment to appeal to this Court.

Moreover, the Law Court's denial of Petitioner's Motion for Stay is neither a final judgment nor does it fall within the recognized exceptions to the final judgment rule. Petitioner does not even suggest this to be the case. On this issue the Law Court "will not consider an appeal unless it derives from a final judgment or order, or unless, notwithstanding the lack of finality, it falls within a recognized exception to the final judgment rule." *Ford New Holland v. Thompson Machine, Inc.*, 617 A.2d 540, 541 (Me. 1992) (citation omitted). The Law Court has held that "an order of judgment is final if 1) the trial court's action fully decides and disposes of the whole matter leaving nothing further for the consideration and judgment of the trial court, and 2) no subsequent proceedings in the case will render the appellate court's decision immaterial." *Id.* (citation omitted). Here, because the merits will be tried in the future and subsequent proceedings could address the propriety of the preliminary injunction granted by the Superior Court, the Petition does not fall within a recognized exception to the final judgment rule.

When the Law Court issued its initial decision on August 5, 1993 in this case, Petitioner chose not to file a Petition for a Writ of Certiorari regarding any aspect of that case, such as the decision on the merits or the standards for review that were delineated for the case on remand. That decision is included in Petitioner's Appendix at 10a-25a. Now, Petitioner, unhappy with the recent Superior Court decision entering the Preliminary Injunction and Order and the denial by the Law Court of its Motion for Stay, apparently seeks to create a "final judgment" out of the injunction prior to a decision by the Law Court and thereby belatedly raise the issue of the applicable standard for Commerce Clause analysis. Petitioner apparently would have had the Law Court, in its

August 5, 1993 decision, hold that the Ordinance is facially discriminatory. The merits of this case and the standards for Commerce Clause analysis, however, are not before this Court and the Petition for a Writ of Certiorari should therefore be denied.

II. THE PETITION CONTAINS NUMEROUS RELEVANT LEGAL AND FACTUAL ERRORS.

In opposition to the Petition, Respondents point out that the Petition is fraught with legal and factual errors, the most relevant of which are included below:

a. In the Question Presented, Petitioner neglects to point out that the August 5, 1993 remand from the Law Court restricted future proceedings to recyclable materials only and not the whole solid waste stream. (Pet. App. 24a).

b. The August 5, 1993 Law Court opinion placed upon Petitioner the burden to prove the very fact it assumes to be part of the "background" stated on page 5 of the Petition (that Tri-State separates recyclable waste and sells it to brokers and recycling processors). Petitioner not only must demonstrate that it has the capacity to separate recyclables and deliver the remaining waste to a designated facility but also must specifically indicate the interstate recycling markets allegedly affected by the City of Auburn Solid Waste Flow Control Ordinance in question ("Ordinance") (Pet. App. 24a).[1]

c. Petitioner incorrectly states at page 5 of the Petition that it has been enjoined from its business as a result of the State court action brought by Respondents. Contrary to this assertion, under the terms of the Preliminary Injunction and Order, Petitioner may continue to collect

---

[1] The Superior Court, in issuing the Preliminary Injunction and Order, found that Petitioner failed to create any record for the court's review that it has the capacity to identify, separate and develop markets for recyclables. (Pet. App. 5a).

solid waste within the City of Auburn so long as it complies with the Ordinance. (Pet. App. 9a).

d. Petitioner incorrectly states the opinion of the Law Court with regard to the standard on remand in *Tri-State Rubbish, Inc. v. The Town of Gray and Regional Waste Systems, Inc.*, 632 A.2d 134 (Me. 1993) (Pet. App. at 55a). Petitioner states at page 8 of the Petition that the Town of Gray and Regional Waste Systems, Inc. ("RWS") must demonstrate that there are "no other reasonable alternatives for the disposal of waste". By contrast, the Law Court stated that the Town of Gray and RWS must "show that reasonable alternatives to the *Ordinance* are unavailable." *Id.* (emphasis added).

e. Contrary to Petitioner's assertions on pages 9 and 19 of its Petition, neither the Law Court in its August 5, 1993 decision nor the Law Court in the decision in *Tri-State Rubbish, Inc. v. Town of Gray and Regional Waste Systems, Inc.*, 632 A.2d 134 (Me. 1993), stated that flow control ordinances are facially discriminatory. (Pet. App. 10a-24a, 55a). Similarly, there was no finding by the Law Court in its August 5, 1993 decision that flow control ordinances are discriminatory *per se*, and the Law Court in *Tri-State Rubbish, Inc. v. The Town of Gray and Regional Waste Systems, Inc.*, specifically rejected any such notion. (Pet. App. 10a-24a, 55a).

f. Petitioner's allegations at page 10 of the Petition that "the status of this case" would present a substantial adverse impact upon it or cause irreparable injury are without substance. In fact, the Superior Court, in issuing the Preliminary Injunction and Order stated that the injunction "may have some adverse impacts on Defendant's finances . . . [but that] those impacts should not be any different than the impacts of the ordinance as applied to all other commercial trash haulers collecting trash within the City of Auburn." (Pet. App. 8a).

g. The Petition in *Town of Gray and Regional Waste Systems, Inc. v. Tri-State Rubbish, Inc. and Recyclables*

Unlimited Services, Inc., U.S.S.C. Docket No. 93-1133 can be distinguished from the Petition here since a timely Petition was filed from the final decision in *Tri-State Rubbish, Inc. v. Town of Gray and Regional Waste Systems, Inc.*, 632 A.2d 134 (Me. 1993), whereas a Petition was not filed from the initial August 5, 1993 decision in this case and there is no current final state court decision from which a Petition for Writ of Certiorari (or at least a Petition that raises the issue Petitioner seeks to address) may be filed.

h. Contrary to Petitioner's assertions on page 14 of its Petition, MMWAC represents a comprehensive, integrated approach to waste management that includes both waste disposal and recycling. (Pet. App. 17a).

i. On page 15 of its Petition, Petitioner asserts that "the EPA has recognized that flow control laws are counterproductive". In fact, the EPA has yet to make a decision on solid waste flow control and recently concluded a series of "town meeting" style forums around the country to assist it in reaching a conclusion.

j. Contrary to Petitioner's assertions on page 17 of its Petition, the Law Court did not find in either its August 5, 1993 decision or in *Tri-State, Inc. v. The Town of Gray*, 632 A.2d 134 (Me. 1993) that flow control laws are "protectionist measures". (Pet. App. 23a-25a and 55a-56a). In both instances, the cases were remanded to decide precisely this question among others.

k. Petitioner's assertion on page 17 of the Petition that the implication of the denial of its Motion for Stay is that the Law Court has adopted a different standard than previously enunciated with regard to Commerce Clause analysis is ludicrous. The Law Court never addressed either the merits of this case or the over-arching Commerce Clause issue in denying of Petitioner's Motion for Stay. (Pet. App. 1a). Petitioner is attempting to have this Court reach the merits of this case by asserting that the

denial of its Motion for Stay has constitutional implications and is a final judgment.

1. At page 20 of its Petition in the penultimate paragraph, Petitioner includes conclusory statements that go to the very heart of this case regarding the purpose of the Ordinance. Since these are the issues to be tried on remand, it is not only premature but irrelevant for Petitioner to include such statements at this juncture and they should be ignored.

CONCLUSION

For the reasons stated above, there is no final judgment in this case, the United States Supreme Court does not have jurisdiction to hear this matter and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

NICHOLAS S. NADZO
Counsel of Record
JAMES N. KATSIAFICAS
EMILY A. BLOCH
JENSEN BAIRD GARDNER & HENRY
10 Free Street, P.O. Box 4510
Portland, Maine 04112
(207) 775-7271
Counsel for Respondent
Mid-Maine Waste Action
Corporation

G. CURTIS WEBBER
LINNELL, CHOATE & WEBBER
83 Pleasant Street, P.O. Box 190
Auburn, Maine 04212-0190
(207) 784-4563
Counsel for City of Auburn